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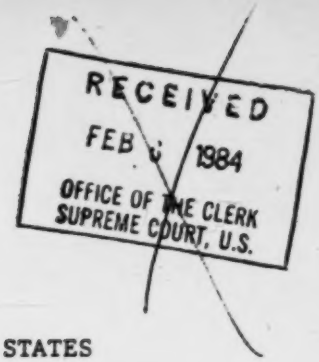

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. [redacted]

ROBERT SAWYER, Petitioner,

VS.

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

CATHERINE HANCOCK
ELIZABETH W. COLE
7031 Freret Street
New Orleans, LA 70118
Phone: (504) 865-5153

Counsel for Petitioner

February 4, 1984

QUESTION PRESENTED

I. Whether the Louisiana Supreme Court misconstrued Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733 (1983) and the requirements of the Eighth and Fourteenth Amendments in concluding that a prosecutor may support an invalid aggravating circumstance through the use of inadmissible evidence that defense counsel had no effective opportunity to rebut during a capital sentencing hearing?

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I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA SUPREME COURT HAS RULED THAT INADMISSIBLE EVIDENCE MAY BE PRESENTED TO A CAPITAL SENTENCING JURY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The Prosecutor Used Inadmissible Evidence To Argue for the Jury's Finding of An Invalid Aggravating Circumstance, Thus Producing a Death Verdict Based on Misleading Information in Violation of Zant v. Stephens.

B. The Focus of the Entire Sentencing Hearing, From Cross-Examination of Defense Witnesses to Closing Arguments, Was upon the Invalid Aggravating Circumstance. Hence, the Inadmissible Evidence Cannot Have Had a Merely "Inconsequential Impact" on the Jury.

C. Defense Counsel Was Denied Notice of the Inadmissible Evidence Relied Upon by the Prosecutor, and the Defendant Was Thus Denied Due Process Because of Counsel's Lack of Opportunity to Rebut the Evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 82-6263

ROBERT SAWYER, Petitioner

v.

STATE OF LOUISIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner, Robert Sawyer, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana in this case.

CITATION TO OPINIONS BELOW:

The opinion of the Louisiana Supreme Court is reported at ___ So.2d ___ (La. 1983), and is attached as Appendix A. The order of the Court denying rehearing is cited at ___ So.2d ___ (La. 1983), and appears at the end of Appendix A. The original judgment of the Louisiana Supreme Court was vacated and the case remanded by this Court in an order reported at ___ U.S. ___, 103 S. Ct. 3567 (1983). The original opinion of the Louisiana Supreme Court is reported at 422 So.2d 95 (1982), and is attached as Appendix B.

JURISDICTION:

Jurisdiction of this Court is invoked under 28 U.S.C. §1257. The opinion of the Louisiana Supreme Court was rendered on November 28, 1983, and rehearing was denied on January 6, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United

States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the statutes in Louisiana governing sentencing in capital cases, La. Code Crim. Pro., Articles 905-905.9, including Louisiana Supreme Court Rule 28 governing review of capital sentences. These are attached as Appendix C.

STATEMENT OF THE CASE:

A. Course of Proceedings

The petitioner, Robert Sawyer, was charged in Jefferson Parish, Louisiana with the first degree murder of Frances Arwood in violation of La. R. S. 14:30. He was convicted of first degree murder on September 19, 1980, and the jury recommended that he be put to death. On October 16, 1980, he was sentenced to death by electrocution.

The Supreme Court of Louisiana affirmed the petitioner's conviction and sentence on October 18, 1982. An application for rehearing was denied on November 24, 1982. A petition for a writ of certiorari was granted by this Court on July 6, 1983, vacating the judgment and remanding the case to the Louisiana Supreme Court for further consideration in light of Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2633 (1983). The Louisiana Supreme Court affirmed the petitioner's conviction and sentence on November 28, 1983. An application for rehearing was denied on January 6, 1984.

A death warrant was signed on December 17, 1982, ordering electrocution to take place on March 8, 1983. The Supreme Court of Louisiana issued a stay of execution on February 10, 1983, pending the timely filing and disposition of the petitioner's first petition for a writ of certiorari.

B. Facts Material to Questions Presented

Evidence was presented at trial that Frances Arwood died of multiple injuries inflicted by Robert Sawyer and Charles Lane. Charles Lane was tried separately and convicted of first degree murder, but he received a sentence of life imprisonment from his capital sentencing jury. State v. Lane, 414 So.2d 1223 (La. 1982).

Robert Sawyer was likewise convicted of first degree murder, with the jury returning findings of two felony-murder-style aggravating circumstances of aggravated arson and aggravated rape.[1] Of the two circumstances, only that of aggravated arson was returned after the penalty phase hearing, although both were again presented to the jury.[2] After the trial verdict was returned, the court went into recess from 2:25 p.m. until 2:55 p.m., when the penalty hearing began. Two further circumstances were alleged for the jury's consideration at the hearing, including that of a previous conviction for "an unrelated murder" under La. Code Crim. Pro., Art. 905.4(c), and the circumstance of the "heinous, atrocious or cruel manner" of the offense under La. Code Crim. Pro., Art. 905.4(g).

During the recess before the penalty hearing, the court ruled on the admissibility of the State's two pieces of evidence intended for use in proving the circumstance of a previous conviction of unrelated murder. Designated "State Penalty 1" were the court minute entries and bill of information from the State of Arkansas regarding Robert Sawyer's prior conviction for involuntary manslaughter six years earlier in 1974. "State Penalty 2" was a packet of material from the State of Arkansas Department of Corrections, showing Sawyer's commitment for three years on that charge, and his subsequent parole after serving one year and ten days. This evidence also showed that Sawyer had been charged originally with second degree murder, but the charge had been reduced to involuntary manslaughter after a court hearing. Throughout the hearing, the presumed plea is referred to as "the

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[1] Under La. R. S. 14:30, the defendant could be convicted for having the "specific intent to kill or to inflict great bodily harm . . . in the perpetration or attempted perpetration of aggravated rape," or "in the perpetration or attempted perpetration of . . . aggravated arson . . . ."

[2] The two felony-murder-style circumstances reappear in La. Code Crim. Pro., Art. 905.4(a). Even though a unanimous jury was required for such findings to be returned at trial, only one of these circumstances was found by the requisite unanimous jury beyond a reasonable doubt at the penalty hearing, as mandated by La. Code Crim. Pro., Art. 905.3, 905.6.

conviction." It is clear that defense counsel could have seen the documents in State Penalty 1 and 2 no earlier than the morning of the day of the sentencing hearing, as they had only been received that day. It is possible that he saw it for the first time during the recess between the trial verdict and the hearing. Tr. 942:9-10; 943:25; 944-1; 944:13-14.

During the recess, defense counsel objected to the State's evidence on the grounds of hearsay, and on the grounds that "it contained a reference to Mr. Sawyer's original charge in the State of Arkansas which was second degree murder and he was eventually convicted of involuntary manslaughter and under the law of Louisiana charges or arrests are not admissible into evidence since the sentencing hearing is to be conducted by the rules of evidence as set forth by Louisiana law . . . ." Tr. 937:6-19 His objections were overruled. On appeal, the Louisiana Supreme Court sustained the trial court's ruling on the hearsay issue. The Court also noted that defense counsel was correct to argue that a jury finding of conviction for a prior unrelated murder could not be supported by the record of a conviction for manslaughter. But the the Court reasoned that the conviction was admissible as character evidence, and thus properly admitted at the sentencing hearing. State v. Sawyer, 422 So.2d 95, 101, 103-04 (La. 1982). This holding was reconfirmed following this Court's remanding of the case. Sawyer v. Louisiana, ___ So.2d ___ (La. 1983)(Appendix A at 10-11).

I. The Prosecution's Case

The State's only witness during the penalty phase hearing was Peter Thomas, Deputy Prosecuting Attorney for the Sixth District of Little Rock, Arkansas, who was not the prosecuting attorney for Robert Sawyer's involuntary manslaughter charge, and who had no personal knowledge regarding it. Mr. Thomas was permitted to read from the documents designated State Penalty 1 and 2 to prove the fact of the conviction and sentence. Tr. 941-943. The prosecutor, Mr. Boudousque, then inquired further by asking the witness:

Q. I ask you to look at State Exhibit 2. How old was Laura Durham [the victim of the manslaughter]? Tr. 943:7-8.

The answer to this question was unknown to Mr. Thomas. It was to be found in what Mr. Thomas referred to as the "Pen Pack" (State Penalty 2), under the heading "Inmate Version of Crime":

> Subject states that he and his family were sitting at the dining table eating and his four year old daughter [1] was playing around and not eating and he drew back his hand and when he did she jumped and fell and hit her left side of her head on the floor causing a blood clot. Subject states that he never did make contact with her. Subject rushed her to the hospital and she died approximately four hours later.

Mr. Thomas did not read this statement to the jury, but referred to it to respond to the prosecutor's question, answering that the victim was four years old. Tr. 946-17. State Penalty 1 and 2 were admitted over objection and the jury was allowed to see them. Tr. 947:15-21. The State then rested.

II. The Defense Case

Defense counsel called as his first witness Robert Sawyer's sister, Glenda White, who testified regarding her brother's deprived childhood. Tr. 948-959. The defense attorney then asked her:

Q. Mrs. White, what do you know about that conviction in Arkansas? Tr. 959:7-8.

Without objection, she was permitted to testify as to what the deceased child's mother had told her of the events surrounding the child's death, that is, that the death had been accidental. Tr. 959-960. Near the end of her narrative, the prosecutor said:

> I have no objections to this testimony. It's all hearsay provided if I have a chance to have the same type of testimony with other hearsay evidence.
>
> THE COURT: You can ask whatever questions you want. Tr. 960:12-16

The first question then asked by the prosecutor on cross-examination of this witness was:

> Q. If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating

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[1]The four-year-old child was not the daughter of Robert Sawyer. He had first met her mother during the child's fourth year, and had shortly thereafter began living with them. Tr. 969.

to the conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child was an abused child, that constantly beaten [sic] by your brother, would you believe those six people? Tr. 961:9-16.

The record does not indicate that the prosecutor showed either the witness, the judge or the defense counsel the file from which he purported to read.

When the witness protested that she didn't know "what somebody else said they saw," the prosecutor then said:

Q. I will read to you a hospital report in reference to little Laurie. Four year old white female, Ms. Laura Sawyer arrived at the emergency room on December 4, 1973, at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. The child was unconscious and her movements were decerebrate. The father stated and it goes on to say the child was frail and appeared to be underweight, particularly noted the child had multiple scars on her body, two healed scars on her forehead, healed scars, not fresh scars. A scar the size [sic] in the right clavicle, a burn scar, a burn on the child's clavicle. She had a scar across her left instep. Upon questioning the father about the scars across the instep he stated it was because the child having dropped a glass on it but her feet had a big purple callus appearing abrasions [sic]. She had multiple bruises, small bruises on her body. Does that indicate to you from what I have just read to you that this child was receiving the tender loving care that you have stated to this jury your brother gave that child. Tr. 961:23-29; 962:1-15.

The record does not indicate that the prosecutor showed to the witness, the judge or the defense attorney the hospital report from which he purported to read.

After further questioning, the prosecutor attempted, through questioning the sister, to use what was apparently a statement purportedly made by Robert Sawyer:

Q. Do you recognize your brother's signature? Tr. 962:23.

A. Yes, I recognize my brother's signature. Tr. 962:24.

Q. Do you recognize his initials. Is this his initials there, R.W.S. Tr. 962:25-26.

A. Yes, that's his initials. Tr. 962:27.

The defense attorney objected to the use of this evidence on the grounds that he had never seen it before. His objection was sustained, and the questioning of the witness soon ceased. Tr. 962:28-29; 963:1-11.

The defense next called the young nephew of the defendant who testified to his good relationship with his uncle. He was not cross-examined.

Robert Sawyer then testified. The first question asked of him by his counsel referred to the conviction in Arkansas: "Tell us what happened." Tr. 968:11. Sawyer then related the circumstances of his meeting Laura Durham's mother and his moving in with her and her child. He testified that on the morning of the child's death, her mother left for work and left her daughter with Sawyer, who intended to take her with him to the construction site where he was to lay bricks that day. After giving her breakfast, he stated,

> Well she was sitting up there playing in the eggs which I was in a hurry to get to work to go on and try if I couldn't lay bricks I was going to do some inside work and she was sitting there, I mean well more or less she was playing in her food and I spoke to her and I told her Laura don't be playing and eat, so we can hurry up and go. Well she kept on playing and stuff and I reached over like to slap her on the shoulder and when I reached to slap her, in other words, like that, she done this in the chair and the chair got unbalanced and over she turned. Of course when she did she hit her head on like I say, on the concrete floor. Well then she went as Mr. Boudousque [the prosecutor] stated in part of his report, I don't know if you've ever seen a muscle spasm but she went into well her right hand went like this. Okey, And she was like, I don't know, I can't explain it. But I can explain it to the best of my ability and she was of course, it scared me.
>
> Q. I think we can understand how she was. What did you do at this point?
>
> A. I picked her up and put her in my car and I went downstairs and called and asked for an ambulance to come to that address and of course I stayed there and of course I went to the bathroom and brought a cold rag and laid it over her head, you know, at the back. Well the ambulance, he arrived I guess within three to five minutes. Well we left there and went to the North Little Rock Hospital which I couldn't ride in the ambulance because they said I wasn't, they put some legal way I wasn't her daddy or her mamma but I did follow them in my car behind them. We got to the hospital, well they wanted me to fill out certain papers and stuff and commenced asking me a bunch of questions. Well I answered the questions the best I could but I was trying to get the baby to get a doctor to examine her because I had my identification. I was proving who I was but I had no I.D. proving I was her daddy because I wasn't. It's true she was going under the name of Laura Durham and of course while at the hospital I did call the furniture company where her mamma was and I did go and stayed at the hospital and I never did leave. I stayed there and she came to the hospital there and Laura died at 5:00 o'clock that afternoon. She died of a blood clot. Tr. 971:7-29; 972:1

Robert Sawyer then testified briefly in response to his counsel's question, "Mr. Sawyer, tell us something about your life," and then cross-examination began:

Q. Did you treat that child good? Tr. 974:29.

A. Yes sir. Tr. 975:1.

Q. Did you ever hit that child? Tr. 975:2.

A. No sir I did not. Tr. 975:3.

Q. Do you recall giving a statement to the police concerning that incident? Tr. 975:4-5.

A. Yes sir I know what you fixing to ask me and I will tell you the same thing I told them. Tr. 975:6-7.

Q. In your statement right here, this what I'm fixing to ask you. Tr. 975:8-9.

A. You are fixing to ask me. (Opposing Counsel examines document). Tr. 975:10-11.

Q. What I'm fixing to ask you Mr. Sawyer -- Tr. 975:12.

MR. WEIDNER: We Object to the use of it and the Court sustained it. Tr. 975:13-15.

MR. BOUDDOUSQUE: This is the defendant's own statement and he made certain representations and this is proper impeachment. Tr. 975:16-19.

This document was apparently the document previously shown to Robert Sawyer's sister for identification of his signature, to which the defense counsel's objection on the grounds of lack of notice had been sustained earlier. The record is silent as to the source of the statement, and the circumstances surrounding its utterance, including the question of whether it was voluntarily made. The prosecutor proceeded to read from it as follows:

Q. On that statement you can read it and you can correct it and show me if I am right or wrong when I got to hospital Laura did have some bruises on her because I was questioned about the bruises and which I told them her mamma had spanked her but myself, I had not ever spanked her. I could do more with talking with her. I never spanked my own son. Tr. 975:26; 976:1-3.

Q. You have never spanked that child before with a belt? Tr. 976:4.

A. No sir I have not. Tr. 976:5.

After an interlude of questioning regarding the time of day of the events of the child's death, the prosecutor resumed his reference to the unidentified statement:

Q. This incident happened in the early morning hours? Tr. 977:2.

A. I don't remember. I don't remember exactly what time of day it happened. Tr. 977:3-4.

Q. Do you recall giving a statement 11:28 p.m. 12-17-73? Tr. 977:5.

A. Yes sir. Tr. 977:6.

Q. In your statement is says yeah, that was her. Gwen, yes sir, did you whip Laura very much. Answer, quite a bit, yes sir. What did you whip her with. A belt. What kind of belt. Just a regular belt. What color was it. Brown with a love thing on it. Do you deny stating that? Tr. 977:7-12.

After further questions clarifying the prosecutor's question, the exchange continued:

A. I have spanked her but I have never beat her. Tr. 978:6.

Q. With a belt. Tr. 978:7.

A. I spanked her with a belt, yeah. Tr. 978:8.

Q. But you don't consider spanking a child with a belt necessarily beating her. Tr. 978:9.

A. No because I know what a beating is. Tr. 978:11.

Next, the prosecutor again referred to a medical report, and the record does not indicate that he showed it to either the judge or defense counsel:

Q. I'm going to show you a medical report where the child was brought to the emergency room, when she arrived at 1:44 p.m., that's quite a time difference between 5:30 in the morning and 1:44 p.m. is it not Mr. Sawyer? Tr. 978:12-16.

And after further questions:

Q. Now you don't know whether it was breakfast or what. I'm going to show you something else. It says the child was frail and appeared to be underweight particularly noticed was the fact the child had multiple scars on her body. We are talking about a child just under three years old are we not? Tr. 979:3-7.

A. Yes sir. Tr. 979:8.

Q. How did this child get multiple scars all over her body. Do you know? Tr. 979:9-10.

A. No sir I don't. Tr. 979:11.

Q. There were two healed scars on her forehead. Tr. 979: 12.

A. I know where they came from, you are talking about the ones -- Tr. 979:13.

Q. I'm talking about the ones in this report. Tr. 979:15.

A. She had a scar, the one you are reading. Tr. 979:16.

Q. There were two healed scars on her forehead and the scar the size of a nickle the right clavicle which appeared to be a burn scar. Tr. 979:17-19.

A. I can tell you she got that from a cigarette from her mamma. Tr. 979:20.

Q. She had a three inch scar across her instep. Tr. 979:21.

A. Over her foot she got that when she stepped on a broken bottle out playing in her grandparents backyard. Tr. 979:22-23.

Q. And both of her feet had purple calcious [sic] appearing abrasions. How did she get that? Tr. 979:24-25.

A. She goes bearfooted [sic] out there. She was going barefooted out there a lot where I was laying bricks and stuff. Tr. 979:26-28.

Q. She had multiple small bruises all over her body and how do you explain those bruises? Tr. 979:28-29.

A. The bruises I don't know because like I told them at the hospital her mamma had spanked her earlier prior to that. Tr. 980:1-3.

Q. So for a three year old, three years into life Mr. Sawyer would you not say this child was fairly well beaten up and scarred: Tr. 980:4-6.

A. Well I got on to her mamma quite a bit for spanking her.

Q. You got on to her mother. Tr. 980:8.

A. Her mother. Tr. 980:9.

Q. But you gave this child tender loving care. Tr. 980:10.

A. No sir. I corrected her trying to be a daddy to her, yes sir, but as far as beating her, no, because I know what it is like being beat. Tr. 980:11-13.

Q. So does Frances Arwood -- Tr. 980:14.

III. The Closing Arguments

Following this last statement by the prosecutor, both sides rested, and the prosecutor opened his argument. The record reflects a speech of five pages, lasting for ten minutes. During the argument, he referred to Robert Sawyer's prior conviction five times: " . . . a 1974 conviction where the defendand took the life of a four year old child." Tr. 981:24; " . . . although I must tell you when I listened to some of the things that she said concerning how beautiful that four year old child was treated." Tr. 983:1-4; " . . . when he decides to take another life into his hands and in this case two within a five year period." Tr. 983:12-14; " . . . he has committed two homicides in five years." Tr. 983:15-16; " . . . the facts of the case that you heard about when little Laurie Durham, four years old, lost her life." Tr. 984:24-26.

The defense attorney's argument is contained on one page of the record, although the record reflects that it took him ten minutes to make it. Tr. 985-986. The prosecutor then gave a two-page, five-minute rebuttal argument, during which he concluded:

> . . . . The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. He speaks in terms of his personal feelings of the death penalty. Such a decision is never easy to make but if Louisiana law, if the law which we have in this state is to have any piece, if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the line because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for killing a four year old child, then what are the people of this Parish to believe. They are going to believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. Don't you see that the criminal justice system, ladies and gentlemen, is not the courts, it's not the judges, it's not technicalities of defense lawyers, it is nothing more than people like you and me and if you are not capable of making these types of decisions so well then you are right, there will be a breakdown and there has been a breakdown but I will tell you what imperfect is, the system is. At least this man has had the occasion to be judged by twelve men of his peers, twelve men and women of his peers and in some other countries he may have been taken out and summarily executed. He has had the due process of law and then he expects you because Charles Lane he did that for a reason because he wants to say well Charles Lane got life imprisonment upon conviction of first degree murder but this man should get the same. Well if I were to tell you that Charles Lane, that I was the prosecutor in that case and the evidence that was presented for Charles Lane, Charles Lane never had a conviction. (emphasis added) [Objection sustained.] Tr. 987:7-19; 988:1-27.

After deliberating for thirty-five minutes, the jury recommended the death penalty at 5:20 p.m. Their recommendation rested on findings of three aggravating circumstances: a) of a prior conviction for an unrelated murder, b) of the heinous nature of the offense, and c) of their trial finding concerning aggravated arson.

C. The Federal Questions Were Raised and Decided Below.

When the judgment in this case was vacated by this Court, and the case remanded for reconsideration in light of Zant v. Stephens, the petitioner submitted timely briefs and made an oral argument, arguing that the death sentence should be vacated and a new sentencing hearing held. Specifically, the petitioner argued that the prosecutor's use of inadmissible evidence allowed the jury's finding of an invalid aggravating circumstance to be based on misleading information, that the evidence could not have had an "inconsequential" impact on the jury, and that defense counsel was denied notice of the evidence and the defendant denied due process because of a lack of opportunity to object to the evidence or to rebut it. These arguments were based on Zant's holding that arbitrary and capricious factors may not be introduced into the jury's deliberation. The Louisiana Supreme Court rejected these arguments in its decision. Sawyer v. Louisiana, ___ So.2d ___ (La. 1983)(Appendix A).

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA SUPREME COURT HAS RULED THAT INADMISSIBLE EVIDENCE MAY BE PRESENTED TO A CAPITAL SENTENCING JURY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

When this Court remanded Robert Sawyer's case for reconsideration in light of Zant v. Stephens, the Louisiana Supreme Court's opinion in the case was already clear on one important Zant issue. The Louisiana Court had ruled that the fact of a prior conviction is admissible in a capital sentencing hearing. Further, the Court had ruled that no constitutional error occurred when the prosecutor erroneously introduced the fact of a prior manslaughter conviction to prove an unsupportable aggravating circumstance of prior "unrelated murder." State v. Sawyer, 422 So.2d 95, 103-04 (La. 1982). Thus the Louisiana Court anticipated correctly this Court's holding in Zant v. Stephens, that "otherwise admissible" evidence does not taint a death verdict simply because the jury is erroneously instructed to consider the evidence as proof of an invalid aggravating circumstance. ___ U.S. ___, 103 S. Ct. 2733, 2747-50 (1983).

On remand, the Zant issue remaining for the Louisiana Court's consideration was whether the prosecutor used inadmissible evidence to prove alleged circumstances surrounding the prior conviction, and whether his reliance on this evidence tainted the death verdict according to Zant standards. Of the eight Louisiana cases pending on this Court's docket and raising Zant arguments at the time Zant was decided, only Robert Sawyer's case presented an example of a prosecutor's reliance on evidence aside from the simple fact of conviction, which evidence was the basis for extensive proof and argument to the sentencing jury concerning an aggravating circumstance that was an unsupportable basis for a death verdict. Robert Sawyer's judgment was the only Louisiana judgment to be vacated and remanded for reconsideration in light of Zant v. Stephens.[1/]

This Court should grant certiorari to review the judgment here because the Louisiana Court has ruled, contrary to the mandate of Zant, that inadmissible evidence cannot taint a death a death verdict as long as there is evidence to support the finding of a valid aggravating circumstance. The Louisiana Court has thus completely disregarded the three essential factors set forth in Zant which determine the circumstances when inadmissible evidence will taint a death verdict. Robert Sawyer's verdict was tainted under Zant, and a new sentencing hearing is required in his case.

A. The Prosecutor Used Inadmissible Evidence To Argue for the Jury's Finding of An Invalid Aggravating Circumstance Thus Producing a Death Verdict Based on Misleading Information in Violation of Zant v. Stephens.

This Court's holding in Zant establishes the conditions

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[1]See State v. Lindsay, 428 So.2d 429 (La. 1981), cert. denied, 104 S. Ct. 261 (1983); State v. Mattheson, 407 So.2d 1150 (La. 1982), cert. denied, 103 S. Ct. 3571 (1983); State v. Monroe, 397 So.2d 1258 (La. 1981), cert. denied, 103 S. Ct. 3571 (1983); State v. Moore, 414 So.2d 340 (La. 1982), cert. denied, 103 S. Ct. 3553 (1983); State v. Narcisse, 426 So.2d 9118 (La. 1983), cert. denied, 104 S. Ct. 202 (1983); State v. Sonnier, 402 So.2d 650 (La. 1981), cert. denied, 103 S. Ct. 3571 (1983); Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982)(Unit A)(en banc), cert. denied, 103 S. Ct. 3553 (1983).

under which an invalid aggravating circumstance may be held not to have tainted a death verdict. Such taint is not present when the evidence adduced is "otherwise admissible," when the erroneous focus upon the invalid circumstance had only an "inconsequential impact" on the jury, and when the evidence was fully subject to explanation and rebuttal by the defendant so as to insure its reliability. ___ U.S. ___, 103 S. Ct. 2733, 2747-50 (1983). All of these conditions were satisfied in Zant, where the fact of a prior conviction "was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." ___ U.S. at ___, 103 S. Ct. at 2748. The erroneous focus upon the conviction occurred solely through the few sentences of the jury instruction where the trial court improperly denominated the prior an aggravating circumstance, and such an error "had an inconsequential impact on the jury's decision regarding the death penalty." ___ U.S. at ___, 103 S. Ct. at 2749. None of these conditions is similarly present in Robert Sawyer's case, and the "need for reliability in the determination that death is the appropriate punishment" has not been satisfied. ___ U.S. at ___, 103 S. Ct. at 2747, quoting from Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The first premise of the Zant doctrine is that evidence concerning an invalid aggravating circumstance must be properly admissible. Indeed, this Court relied expressly in Zant on the Georgia Supreme Court's assurance that a death verdict could be set aside if evidence "was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." ___ U.S. at ___, 103 S. Ct. at 2750. This concern over admissibility is based on the premise that the invalid aggravating circumstance should not be supported by "erroneous or misleading information." See Zant, ___ U.S. at ___, 103 S. Ct. at 2748 n. 24 (reserving the question whether a death verdict would be impaired if an invalid finding "relied on materially inaccurate and misleading information.") Accord, Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418, 3433 (1983)

(Stevens and Powell, JJ., concurring).

In Robert Sawyer's case, the Louisiana Supreme Court has chosen not to give this Court the same assurance as the Georgia Court, and has not closely examined the admissibility of the prosecutor's extensive use of evidence concerning the prior conviction. The inadmissible evidence here consists of allegations of the existence of witness statements concerning Laura Durham's physical condition, portions of an unidentified hospital report read into the record twice, and portions of an unidentified statement by the defendant to police, read into the record as well. The Louisiana Supreme Court has not concluded that the prosecutor's use of this evidence was proper, as indeed its admissibility is doubtful under the federal Constitution. See Michelson v. United States, 335 U.S. 469, 480-81(1948)(the cross-examiner must possess a good faith basis for inquiry into specific acts of conduct when attempting to impeach character witnesses). Instead, the Louisiana Supreme Court has assumed that "even if the evidence had been inadmissible, no serious prejudice could have resulted to the defendant." Sawyer v. Louisiana, ___ So.2d ___, ___ (La. 1983)(Appendix A at 11).

Assuming this evidence is inadmissible, as the Louisiana Supreme Court's holding requires here, it is clear that the evidence is not only inadmissible but misleading and unreliable as well. Its misleading quality comes from the prosecutor's failure to identify or document his sources, from his selective use of the evidence in portions which may or may not be representative of actual content, and from his failure to give defense counsel notice of this evidence or an effective opportunity to rebut it. Most importantly, even if some misleading evidence should occasionally be permitted to be considered by a sentencing jury in cases where its materiality is remote, the misleading evidence does not occupy such a minor niche in Robert Sawyer's case.

B. The Focus of the Entire Sentencing Hearing, From Cross-Examination of Defense Witnesses to Closing Arguments, Was upon the Invalid Aggravating Circumstance. Hence, the Inadmissible Evidence Cannot Have Had a Merely "Inconsequential Impact" on the Jury.

Unlike Zant, the impact of the prosecutor's inadmissible evidence on the jury extends beyond a simple erroneously-focussed jury instruction. Of the four aggravating circumstances presented to the sentencing jury, virtually the entire penalty hearing was focussed on the circumstance of Robert Sawyer's prior conviction. It would have been proper for a trial judge to instruct the jury to consider the fact of the prior conviction, as hypothesized in Zant. ___ U.S. at ___, 103 S. Ct. at 2749. It would surely not have been proper to instruct the jury to focus on the extensive inadmissible evidence introduced by the prosecutor.

While no such instruction was given, the impact of the inadmissible evidence cannot be deemed "inconsequential" when a prosecutor chooses to make the invalid aggravating circumstance a cornerstone of his request for the death penalty. In Robert Sawyer's case, the prosecutor referred to the prior conviction five times during closing argument, and again in his rebuttal. In addition, he focussed the jury's attention on the prior conviction as the chief distinction between Sawyer and his equally guilty accomplice, Charles Lane, who had received a life sentence. Even the Louisiana Supreme Court chose to note that this distinction was the chief distinction between the two defendants. State v. Sawyer, 422 So.2d 95, 106 (1982). Yet the Court suggests now that the inadmissible evidence concerning the prior conviction cannot have resulted in "serious prejudice" to the defendant. Such a conclusion contradicts the Court's own earlier finding, and fails to accord with the Zant premise that an erroneous focus on an invalid aggravating circumstance is permitted so long as it could have had only an inconsequential impact on the jury.

C. Defense Counsel Was Denied Notice of the Inadmissible Evidence Relied Upon by the Prosecutor, and the Defendant Was Denied Due Process Because of Counsel's Lack of Opportunity to Rebut the Evidence.

Not only Zant, but this Court's prior cases hold that defense counsel must be given "an opportunity to comment on facts which may influence the sentencing decision in capital cases." Gardner v. Florida, 430 U.S. 349, 360 (1977). The guarantee of an opportunity to present mitigating circumstances to a sentencing jury is buttressed by a further concern for rebuttal of the facts concerning aggravating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). This Court made this concern part of its doctrine for invalid aggravating circumstances in Zant when it emphasized that the Zant defendant conceded that he had a full opportunity to rebut the evidence of the fact of his prior conviction.

Robert Sawyer's counsel did not have such an opportunity to rebut the inadmissible evidence of witness statements, hospital report, or police report, for the record reflects his lack of notice of such evidence. This lack of opportunity not only denied his client due process under the guarantee of Gardner, but also heightened the unreliable and misleading nature of the prosecutor's use of this evidence, untested as it was by "the debate between adversaries [that] is often essential to the truth-seeking function." Gardner, 430 U.S. at 360. The failure of the prosecutor's evidence to meet any one of Zant's three criteria for reliable death verdicts requires this Court to find that the jury's discretion was not "suitably directed and limited so as to minimize the risk of arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(opinion of Stewart, Powell and Stevens, JJ.). The mandates of Furman v. Georgia, 408 U.S. 238 (1972) thus have been violated by the judgment of the Louisiana Supreme Court in this case.

CONCLUSION:

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court.

Respectfully submitted,

Catherine Hancock

CATHERINE HANCOCK

Elizabeth W. Cole

ELIZABETH W. COLE

7031 Freret Street
New Orleans, Louisiana 70118
Counsel for Petitioner

February 4, 1984

Appendix A: Opinion of the Louisiana Supreme Court, ___ So.2d ___ (La. 1983), rendered on November 28, 1983; rehearing denied, January 6, 1984.

NOV 28 1983

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

ROBERT SAWYER

versus

STATE OF LOUISIANA

On Remand from the
United States Supreme Court

BLANCHE, Justice

Defendant was convicted of first degree murder and subsequently sentenced to death. The conviction and sentence were affirmed in State v. Sawyer, 422 So.2d 95 (La. 1982). Defendant applied for a writ of certiorari to the United States Supreme Court, on the ground that evidence of another crime not considered a statutory aggravating circumstance was admitted at the sentencing, thereby injecting an arbitrary factor into the jury's decision making process. The Supreme Court remanded the case to this court for consideration in light of the holding in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983).

FACTS

The gruesome and depraved facts surrounding this case were given a thorough treatment in the court's previous opinion. See Sawyer, 422 So.2d 95 (La. 1983). Therefore, we give only a brief recitation of the circumstances leading to defendant's conviction. On September 29, 1979, Fran Arwood was at the residence of defendant, where she was helping to care

Calogero, J. concurs. See his concurring portion of my concurring/dissenting opinion in State v. Sawyer, #80-1892.

Dennis, J. concurs with reasons.

for the young children of defendant's live-in girlfriend. Defendant and a friend, Charles Lane, attacked Ms. Arwood, striking her repeatedly in the face. Thereafter, the two men proceeded to torture the victim by first dunking her body into scalding water, then beating her and ultimately, setting fire to the victim's genitalia with lighter fluid. The testimony of Ms. Shano at trial also indicated that, at some stage, the victim was raped. After this savage attack, defendant and Lane left the mortally wounded victim on the floor of the house until relatives of Ms. Shano arrived later in the day.

Both defendant and Lane were indicted for first degree murder. Lane was tried separately and sentenced to life imprisonment. State v. Lane, 414 So.2d 1223 (La. 1982). Defendant was convicted by a unanimous jury, which then proceeded to sentence defendant to death.

At the sentencing hearing, the State reoffered evidence presented in its case in chief to establish that defendant had murdered the victim while in the perpetration of aggravated arson and aggravated rape, and that defendant had murdered the victim in an unusually cruel manner. Additionally, the State called a deputy prosecutor from Arkansas, who introduced documentary evidence that defendant had pled guilty to involuntary manslaughter of a four-year old child, and had served one year in prison as a result. Afterwards, defendant testified about the guilty plea and his version of the event leading to the child's death. Both defendant and his sister offered mitigating testimony as to defendant's brutal childhood and one time institutionalization at a state mental health facility.

Upon hearing all the evidence, the jury announced its finding of three statutory aggravating circumstances: (1) that

defendant was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that defendant was previously convicted of an unrelated murder and sentenced defendant to death. On appeal, this court found that the last aggravating circumstance was not supported by the evidence, 422 So.2d at 101, but correctly observed that only one aggravating circumstance need be found in order to place defendant in the category of offenders capable of receiving the death penalty. Defendant, however, argued that introduction of testimony relating to the manslaughter plea was improper, since it was neither admissible as an aggravating circumstancein the guilt phase of the trial, nor as other crimes evidence in the sentencing phase where defendant had not previously placed his character at issue. In upholding the admission of the testimony, this court found that Louisiana C.Cr.P. art. 905.2 allowed the evidence to be considered to show defendant's bad character, reasoning that defendant's character is put at issue by the nature of the proceeding, regardless of whether he takes the witness stand on his own behalf and places his character at issue.

ISSUE

On remand, we are asked to consider our previous holding in light of Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). In that case, the U.S. Supreme Court affirmed the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury did not impair the death sentence in the case. Based upon our reading of Zant, we frame the following issues for resolution: (1) Under the Louisiana statutory scheme, does the

finding of an additional aggravating circumstance that is later found invalid have any affect on the jury's sentence determination, where evidence of the invalid circumstance was otherwise admissible? (2) Was evidence of the invalid aggravating circumstance admissible in the instant case to show defendant's character, where defendant had not first placed his character at issue? (3) If inadmissible, was the evidence so consequential that it injected an arbitrary factor in the jury's decision to sentence defendant to death?

THE STATUTORY SCHEME

Louisiana's capital sentencing procedure, La. C.Cr.P. art. 905-905.9, is similar in many respects to the Georgia procedure examined in Zant.[1] As in Georgia, the trial of an

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[1] The Georgia sentencing procedure was explained in detail by the Georgia Supreme Court in response to the U.S. Supreme Court's certified question in Zant, 250 Ga.97, 297 S.E.2d 1 (1982). Essentially, the Georgia System is divided into three planes:

I. Ga. Code Ann. §26-1101 separates those homicide cases which fall into the category of murder. This is an issue of fact determined during the guilt phase of the trial.

II. Ga. Code Ann. §27-2534.1 provides that unless at least one aggravating circumstance is found, the death penalty may not be imposed in a given murder case.

III. Once it is determined that the death penalty may be imposed, the fact finder determines whether it shall be imposed. This determination takes into account all relevant evidence in mitigation or aggravation, and vests [illegible] discretion in the fact finder.

Superimposed on this scheme is the automatic appeal to the Georgia Supreme Court, who determines whether the penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

individual charged with first degree murder is bifurcated; consisting of a guilt phase and a penalty phase. During the guilt phase of the trial, the jury must make the initial determination whether the defendant belongs in the class of offenders who may be exposed to the death penalty. La. R.S. 14:30 provides that in addition to specific intent to kill a human being, the offense must include one of four aggravating circumstances.[2] Once the defendant has been found guilty, the jury must then determine whether defendant will be given the death sentence.

The process of sentencing is explained in Code of Criminal Procedure Art. 905.3, which states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists, and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

---

[2] La. R.S. 14:30 states:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
>
> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

Clearly, then, the sentencing phase is itself broken down into two aspects. Initially, the jury must find the existence of at least one statutory aggravating circumstances before an offender can be sentenced to death. Because the aggravating circumstances listed in Article 905.4 include most of the aggravating circumstances listed in R.S. 14:30, the jury will usually have already found at least one aggravating circumstance before it reaches the penalty phase of the trial. Louisiana's scheme differs from Georgis's in this respect, for the class of offenders in Louisiana eligible for the death penalty is considerably narrower after the guilt phase of the trial.[3]

Once a single aggravating circumstance is found, the jury may then consider all the evidence, both in aggravation and mitigation, in order to make the final determination that the offender should be put to death. The finding of additional aggravating circumstances are therefore unnecessary to advance

---

[3] Under Ga. Code. Ann., murder punishable by death is defined in the following manner:

§26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of a human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Clearly, then what is considered second degree murder in Louisiana would be considered murder in Georgia, subject to the death penalty.

the case to consideration of whether the death penalty will in fact be imposed. Nothing in the statutory scheme requires that the jury weigh two or more aggravating circumstances more heavily against the defendant than a single aggravating circumstance. Rather, the finding of statutory aggravating circumstances is simply a preliminary step before any balancing process can be undertaken.[4]

ADMISSIBILITY OF THE EVIDENCE

While the failure of an aggravating circumstance may not of itself impair the sentence, the introduction of otherwise inadmissible evidence in support of the circumstance could inject an arbitrary factor in the sentencing process. Defendant maintains in the instant case that inadmissible evidence was put before the jury in the form of testimony of the involuntary manslaughter conviction.

Defendant's argument is based on the language of C.Cr.P. art. 905.2, which addresses the conduction of sentencing hearings. The article provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender.

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[4] Additional protection is afforded defendant by Rule 28 of the Louisiana Supreme Court, which provides for automatic review by this court to determine if the sentence is excessive. Included in this review are inquiries into whether:

(1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; and

(2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and

(3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

> The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Defendant contends that the second sentence of 905.2 precludes the introduction of other crimes evidence unless offered to show defendant's bad character, or to support a valid aggravating circumstance.[5] 905.4(c) limits other

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[5] Article 905.4 provides that:

> The following shall be considered aggravating circumstances:
>
> (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
>
> (b) the victim was a fireman or peace officer engaged in his lawful duties;
>
> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;
>
> (e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;
>
> (f) the offender at the time of the commission of the offense was imprisoned

(Footnote [5] continued on page 9)

crimes which may be considered aggravating circumstances to convictions of unrelated murders, aggravated rape, or aggravated kidnapping, or where the offender has a significant prior history of criminal activity. It does not include guilty pleas, or for that matter, convictions of involuntary manslaughter.[6] Accordingly, defendant argues that he has not placed his character at issue by taking the stand, evidence of the guilty plea cannot be introduced. As further support for this proposition, defendant points to the following sentence of 905.2 - which allows for other crimes evidence to be introduced regardless of whether defendant has taken the stand if it relates to the aggravating circumstances - as a limited exception to the general rules of evidence by which the hearing should be guided.

(Footnote [5] continued from page 8)

after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witnesses in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

[6] See State v. Antonio James, ___ So.2d ___ (La. 1983) (Blanche, J., concurring in part and dissenting in part).

This argument was espoused by defendant when the case was originally before this court, State v. Sawyer, 422 So.2d 95 (La. 1982). We rejected the argument then, and most recently, in the case of State v. Jordan, ___ So.2d ___ (La. 1983).[7] Now, after having been asked to reconsider the question, we affirm our prior holdings.

The first sentence of 905.2, which defendant ignores in his effort to expand the meaning of the second sentence, expresses the true intent of the statutory scheme. When it commands that the sentencing hearing focus on the "circumstances of the offense and the character[8] and propensities of the offender," 905.2 makes it clear that the character of the defndant is one of the two most relevant factors with which the sentencing hearing should be concerned. As we observed in State V. Mattheson:

> The above article clearly provides that the focus of the sentencing hearing is on "the character and propensities of the offender" as well as the circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant irrespective of whether defendant places his character at issue.

407 So.2d 1150, 1164 (La. 1981) In State v. Jordan, we stated that "it is axiomatic that the conviction per se puts the convicted offender's character at issue" ___ So.2d ___, ___ (La. 1983). At the heart of such a statement rests the underlying difference between the uses of character evidence at the guilt and sentencing phases of a trial. The rules of evidence prohibit the use of character evidence where defendant has not placed his character at issue for the simple reason that such evidence is not relevant to the issue of guilt. To the contrary, in a sentencing hearing, the jury is asked to scrutinize defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed.

We are of the opinion that the reference to the rules

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[7] The opinion was authored by Judge Julian Bailes, sitting for Justice Marcus.

[8] Emphasis added.

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of evidence contained in Article 905.2 was placed there to regulate the introduction of competent versus incompetent evidence, and should not be construed to prohibit introduction of highly relevant character evidence at the sentencing hearing.[9] Thus, we conclude that the evidence of defendant's guilty plea to involuntary manslaughter of a four-year old child was properly admitted to show defendant's character.

ARBITRARINESS

Although we find that the evidence was admissible under Article 905.2, and thus injected no arbitrary factor into the decision process of the jury, we think that even if the evidence had been inadmissible, no serious prejudice could have resulted to defendant. Defendant has argued strenuously in his brief that the prosecutor relied heavily on the details surrounding defendant's guilty plea to manslaughter to convince the jury to return a death sentence. Regardless of whatever emphasis the prosecutor placed on the guilty plea, it is inconceivable, given the overwhelming evidence of the heinous nature of the principal offense already before the jury, that the additional evidence of the manslaughter plea could have seriously prejudiced defendant at that point.

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[9] In a concurring opinion to Jordan, J. Lemmon noted the absurd result of applying the other crimes rule to a sentencing hearing:

> "It is therefore highly doubtful that the Legislature intended for the defendant to control the decision on which evidence of his character and propensities will be introduced at the penalty hearing. Yet this is exactly what the adoption of defendant's argument would permit." State v. Jordan, ___ So.2d ___, at ___ (La. 1983) (Lemmon, J., concurring).

DECREE

For the reasons assigned, we find that the failure of one of three statutory aggravating circumstances did not create an arbitrary factor in the sentencing of defendant by allowing inadmissible evidence to be considered by the jury. Therefore, the sentence of defendant is affirmed.

AFFIRMED

CHIEF JUSTICE
JOHN A. DIXON JR
ASSOCIATE JUSTICES
PASCAL F. CALOGERO JR
WALTER F. MARCUS JR
JAMES L. DENNIS
FRED A. BLANCHE JR
JACK CROZIER WATSON
HARRY T. LEMMON
CLERK OF COURT
FRANS J. LABRANCHE JR

Supreme Court
STATE OF LOUISIANA
New Orleans

January 6, 1984

301 LOYOLA AVE 70112
TELEPHONE 504 568 5707

Elizabeth W. Cole, Esq.
Tulane Criminal Law Clinic
7031 Freret St.
New Orleans, LA 70118

Hon. John M. Mamoulides
District Attorney
William C. Credo, Esq.
Louise Korns, Esq.
Assistant District Attorneys
24th Judicial District Court

Re: No. 81-KA-1566
Robert Sawyer vs. State of Louisiana

Dear Counsel:

Enclosed please find a News Release documenting this Court's denial of the Application for Rehearing, in the above entitled referenced case.

This judgment is now final. By copy of this letter, we are advising the Clerk of Court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,

Frans J. Labranche, Jr.
Clerk of Court

FJLJr/kf
Encl.
ccs: Hon. M. Joseph Tiemann
Hon. William Justice, Jr.

FOR [redacted]

On the 6th day of January, 1984, the following [redacted] of Louisiana, composed of Chief Justice John A. [redacted] Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. [redacted] Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARING GRANTED:

82-C-2915 Robert B. Todd, et al v. State, Through Dept. of Natural Resources of the State of Louisiana

REHEARINGS DENIED:

81-KA-1566 State v. Robert W. Sawyer

82-C-1583 Southern American Ins. Co. v. Ronald Dobson
(2 applications)
CALOGERO, MARCUS and BLANCHE, J.J., would grant a rehearing.
LEMMON, J., concurs with reasons.

82-KA-1946 State v. Nicholas H. Gill
WATSON, J., would grant a rehearing.

82-KA-2017 State v. Sammy Joe Johnson
DIXON, C.J., & CALOGERO, J., would grant a rehearing.

82-K-2061 State v. Clifton Belton
C/W
82-KA-2120 DIXON, C.J., CALOGERO & DENNIS, J.J., would grant a rehearing.

82-C-2367 Vernon L. Lewis v. Exxon Corp., et al
WATSON, J., would grant a rehearing.

83-KA-0734 State v. Frederick Kirkpatrick, etc.

83-CA-1197 Dixie Electric Membership Corp. v. La. Public Service Commission

83-CA-1199 Southwest La. Electric Membership Corp. v. La. Public Service Commission

83-CA-1627 M & G Fleet Service, Inc. v. Louisiana Public Service Commission

83-CA-1855 M & G Fleet Service, Inc. v. Louisiana Public Service Commission

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. A-626

ROBERT SAWYER
Petitioner
VS.
STATE OF LOUISIANA
Respondent

ORIGINAL

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SUPREME COURT, U.S.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The petitioner, Robert Sawyer, who is now held in the Louisiana State Penitentiary at Angola, Louisiana asks leave to file the attached petition for a Writ of Certiorari to the Supreme Court for the State of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

On or about February 1, 1983, counsel assumed the responsibility to represent the petitioner, without a fee, for the purpose of preparing and presenting the attached petition. Petitioner was represented by appointed counsel at both the state District Court and Supreme Court levels.

The petitioner's affidavit in support of this motion is attached hereto.

ELIZABETH W. COLE
7031 FRERET STREET
NEW ORLEANS, LA 70118
TELEPHONE (504) 865-5153

BY: Elizabeth W. Cole
ELIZABETH W. COLE

ATTORNEY FOR ROBERT SAWYER

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ORIGINAL

83-6258

RECEIVED
FEB 13 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Robert Sawyer
Petitioner
vs.

State of Louisiana
Respondent

Affidavit in Support of Motion To Proceed in Forma Pauperis

I, Robert Sawyer being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: (1) I am the petitioner in the above entitled case; (2) because of my poverty I am unable to pay the costs of said case; (3) I am unable to give security for the same; (4) I believe that I am entitled to the redress I seek in said case.

I was sentenced to a State penitentiary by a District Court for the Parish of Jefferson, Louisiana on a charge of first degree murder. I am still serving my sentence and therefore have no current employment, nor have I received income in the past year. I have no savings or checking accounts and no longer own any valuable property. No persons are dependent on me for support.

I understand that a false statement on this affidavit will subject me to penalties of perjury.

Robert Sawyer
ROBERT SAWYER

SWORN TO AND SUBSCRIBED before me this 9 day of Feb. 84, 1984 at Angola, Louisiana.

Claris Tillery
NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

83 - 6258

NO: ~~83-6263~~

ROBERT SAWYER,
PETITIONER

VERSUS

LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA

WILLIAM GUSTE, JR
Attorney General
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
State of Louisiana

JOHN M. MAMOULIDES
District Attorney
24th Judicial District Court
State of Louisiana

PHILIP BOUDOUSQUE
Assistant District Attorney
24th Judicial District Court
State of Louisiana

LOUISE KORNS
Of Counsel
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053

WILLIAM C. CREDO, III
Assistant District Attorney
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053
Telephone: (504) 368-1020

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IN THE

SUPREME COURT OF THE UNITED STATES

NO: 82-6263

ROBERT SAWYER,

PETITIONER

VERSUS

LOUISIANA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA

OPINIONS BELOW

Petitioner's sentence was originally affirmed in November of 1982. State v. Sawyer, 422 So.2d 95 (La. 1982). Petitioner's sentence was again affirmed in November of 1983. State v. Sawyer, No. 81-KA-1566 (La. Nov. 28, 1983).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the failure of one statutory aggravating circumstance invalidates a sentence which is supported by at least one valid statutory aggravating circumstance.

II. Whether evidence of a prior conviction is admissible at a sentencing hearing.

III. Whether petitioner's sentence was imposed under the influence of arbitrary factors.

STATEMENT OF THE CASE

A. Course Of Proceedings

Petitioner, Robert Sawyer, was convicted of first degree murder on September 19, 1980; petitioner was sentenced to death on October 16, 1980.

Petitioner's sentence was affirmed in November of 1982.

Petitioner's case was remanded by the United States Supreme Court to the Louisiana Supreme Court in July of 1983. Sawyer v. Louisiana, ____U.S.____, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

Petitioner's sentence was again affirmed in November of 1983.

B. Statement Of The Facts

The facts of the case are stated fully in the Louisiana Supreme Court decision as reported at 422 So.2d 95, 97 (La. 1982). The following facts are pertinent to the instant petition. At petitioner's sentencing hearing the prosecution introduced evidence of a guilty plea petitioner had entered in Arkansas on a charge of manslaughter. Petitioner then cross-examined the State's witness, called an additional witness, and testified himself. The facts underlying the manslaughter plea were brought out in great detail. On petitioner's initial appeal to the Louisiana Supreme Court the court found that evidence of the manslaughter plea had been properly admitted. Through the manslaughter plea was not properly a statutory aggravating circumstance. State v. Sawyer, 422 So.2d 95, 103 (La. 1982). The court further found that petitioner had been prepared for and had actively participated in the sentencing hearing. Sawyer, 422 So.2d at 104.

LAW AND ARGUMENT

Petitioner, Robert Sawyer, asks this Court to review Louisiana's recent decision upholding his sentence of death; petitioner's sentence was upheld for a second time by the Louisiana Supreme Court in November of 1983. State v. Sawyer, No. 81-KA-1566 (La. Nov. 28, 1983) (on remand). In his application petitioner argues that the Louisiana decision is in violation of the guidelines established in Zant: petitioner contends that the Louisiana Court was in error in allowing his conviction to stand after the court found one of the statutory aggravating circumstances supporting the sentence to be invalid (the fact of a previous guilty plea on petitioner's part). Petitioner maintains that the Louisiana Court was in error in allowing this fact into evidence at petitioner's sentencing

hearing; petitioner further maintains that this evidence disproportionately affected the jury's sentencing choice. Respondent, the State of Louisiana, respectfully submits that petitioner is in error in his interpretation of Louisiana's capital sentencing scheme; petitioner is particularly in error in his understanding of the function of the statutory aggravating circumstances. A review of Louisiana's capital sentencing scheme shows that it is almost indistinguishable (in one significant aspect) from the scheme recently approved by this Court in Zant; the failure of one statutory aggravating circumstance does not of itself invalidate a sentence of death. Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 77L.Ed.2d 253 (1983). Further, the Louisiana scheme clearly invites the introduction of a fairly wide spectrum of evidence (in addition to the statutory aggravating circumstances) at the capital sentencing hearing.

I. SUFFICIENCY OF AGGRAVATING CIRCUMSTANCES

Petitioner's case was remanded to the Louisiana Supreme Court in July of 1983 for further consideration "in light" of Zant v. Stephens. Sawyer v. Louisiana, ___U.S.___, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). The Louisiana Supreme Court opinion on remand was issued in November of 1983: the court addressed three questions, one of which was the function of the statutory aggravating circumstances (La.C.Cr.P. art. 905.4). The court specifically found that the failure of one aggravating circumstance would not impair the validity of a death sentence which was supported by at least one other valid statutory aggravating circumstance. Louisiana's capital sentencing scheme, as noted by the Louisiana Supreme Court, is identical in this one function to the Georgia statute approved in Zant. Saywer, slip opinion at 6.

Petitioner's sentence was first affirmed in October of 1982. State v. Sawyer, 422 So.2d 95 (La. 1982). The court affirmed its prior holding in November of 1983. The two opinions, read together, offer the following interpretation to Louisiana's capital sentencing scheme. La.C.Cr.P. art. 905 et seq. . . . .

It was established in the original Sawyer opinion that La.C.Cr.P. art. 905.3 requires the finding of only one statutory aggravating circumstance to support consideration of the death penalty; the existance of one aggravating circumstance is sufficient to place a defendant in the category of offenders exposed to the death penalty.[1] Sawyer, 422 So.2d

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1 The Louisiana Supreme Court has consistently characterized additional aggravating circumstances as unnecessary. State v. Martin, 376 So.2d 300, 312 (La. 1979); State v. Sonnier, 379 So.2d 1336, 1359 (La. 1980); State v. Narcisse, 426 So.2d 118, 138 (La. 983); State v. Lindsey, 428 So.2d 420, 424 (La. 1983).

at 101-2. The court explained more fully in the second opinion: once a single aggravating circumstance is found, the jury may consider additional evidence to make the final determination whether or not to recommend the death penalty. The finding of statutory aggravating circumstances is unnecessary to advance a case to consideration of whether the death penalty is appropriate; the statutory aggravating circumstances are simply apreliminary step before any balancing process can be undertaken. Sawyer, slip opinion at 6-7.

The Louisiana Supreme Court has noted the similarity between the Georgia's statute and the Louisiana one. The Louisiana statute describes "two aspects" at the sentencing phase, much like the "two planes" described by the Georgia statute. Like the Georgia statutory aggravating circumstances, the Louisiana statutory aggravating circumstances are not weighed in any particular manner. Sawyer, slip opinion at 7; Zant, 103 S.Ct. at 2741, 77 L.Ed.2d at 247. Rather, the Louisiana statutory aggravating circumstances "circumscribe" the class of persons who are death eligible. Sawyer, slip opinion at 7; Zant, 103 S.Ct. at 2743, 77 L.Ed.2d at 250. Further, under Louisiana law, the sentencing jury is free to return a life sentence though they have found the presence of any statutory aggravating circumstance. La.C.Cr.P. art. 905.3; La.C.Cr.P. art. 905.6; State v. Watson, 423 So.2d 1130, 1135 (La. 1982).

The Louisiana Supreme Court has specifically held that the failure of one aggravating circumstance does not invalidate a sentence which is supported by at least one other valid aggravating circumstance. Sawyer, 422 So.2d at 101. The Louisiana Supreme Court affirmed the jury findings of two other statutory aggravating circumstances in petitioner's case: the court affirmed the finding that the murder had been committed during the perpetration of an aggravated arson; the court also affirmed the finding that the murder had been committed in an especially cruel manner (the court refers to the facts of petitioner's case as gruesome and depraved in its 1983 opnion). The State respectfully submits that the failure of petitioner's 1974 guilty plea as a statutory aggravating circumstances does not invalidate petitioner's instant sentence; the remaining statutory aggravating circumstances are adequate to support petitioner's death sentence.

II. ADMISSABILITY OF PETITIONER'S 1974 GUILTY PLEA

Once a defendant is found death eligible by the finding of at least one statutory aggravating circumstance, the jury considers any additional relevant evidence offered in its final determination as to the appropriate sentence. La.C.Cr.P. Art. 905.2; La.C.Cr.P.

art. 905.3. The state respectfully submits that petitioner is in error to argue that evidence of his 1974 guilty plea was inadmissible at the instant sentence hearing; the Louisiana Supreme Court has clearly held that the evidence of petitioner's guilty plea, though not a valid statutory aggravating circumstance, was admissible as evidence of petitioner's character or of his propensities to commit crime. La.C.Cr.P. art 905.2. The State respectfully submits that the Louisiana approach, which encourages the admission of all relevant evidence, has been approved by this Court as an effective method of "individualizing" sentences.

In its original affirmal of petitioner's sentence the Louisiana Supreme Court found the evidence of petitioner's manslaughter plea admissible as evidence of petitioner's character--one of the "principal" issues at any sentencing hearing. Sawyer, 422 So.2d at 103-4. The court here found the evidence admissible over hearsay objections; the court noted that the documents introduced to verify the fact of petitioner's plea had been properly authenticated. Sawyer, 422 So.2d at 102. In the court's recent opinion the court again ruled that the evidence was admissible; the court noted that a conviction per se puts the convicted one's character at issue. Sawyer, slip opinion at 10. The court again stressed that reference to rules of evidence found in the capital sentencing scheme were merely to assure the competency of evidence introduced. (See also State v. Jordon, 440 So.2d 716, 719 (La. 1983).

The Louisiana Supreme Court has acknowledged this Court's approval of the use of extensive evidence at sentencing hearings in the interest of "individualizing" sentences. Sawyer, 422 So.2d at 103. This Court has held that sentencing should be done in an "informed" manner and that the sentence may reflect the jury's evaluation of the character of the accused. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2832, 49 L.Ed.2d 859, 883 (1976). This Court has further held that restrictions on evidence at sentencing hearings should be limited; this Court has stated that arguments at this phase of trial should be open and as far ranging as possible. Gregg, 96 S.Ct. at 2939, 49 L.E.2d at 891. The sentencing jury should have before it all relevant information which will encourage an individualized sentence. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929, 941 (1976). This Court has also stated that beyond certain limitations, it will defer to the State's choice in substantive factors deemed relevant to sentencing procedures. California v. Ramos, ___U.S.___, 103 S.Ct. 3446, 3453, 77 L.Ed.2d 1171, 1181 (1983). This Court has simply acknowledged that the sentencing phase of a criminal trial is of a

different nature from the guilt phase; the jury is free to consider a "myriad" of otherwise objectionable facts at the sentencing phase. Ramos, 103 S.Ct. 3456, 77 L.Ed.2d 1185.[2]

Petitioner cannot object that the admission of his record offends the Constitution; this Court has specifically upheld the admissability of prior records in sentencing proceedings. Zant, 103 S.Ct. at 2748, 77 L.Ed.2d at 256; Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3427, 77 L.Ed.2d 1134, 1178 (1983). Petitioner does not suggest that the Louisiana Court has allowed "constitutionally protected" behavior to enter into the sentencing determination (see Zant, 103 S.Ct. at 2746, 77 L.Ed.2d at 245). Nor does petitioner allege that the plea was incompetent for any reason.

Finally, the Louisiana court specifically found that petitioner had been able to rebut the evidence presented by the State (see Zant, 103 S.Ct. at 2748, 77 L.Ed.2d at 256). The court found that defendant had been prepared to meet the evidence and that he had done so. Sawyer, 422 So.2d at 104.

The scope of evidence admissible at a sentencing hearing is a matter of state law (see Sawyer, 422 So.2d at 102, footnote no. 13). The Louisiana Supreme Court found the evidence of petitioner's record to be admissible at the instant sentencing hearing; this finding should be binding. Brown v. Ohio, 432 U.S. 161, 975 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); Wainwright v. Goode, ___U.S.___, 104 S.Ct. 378, 382, 78 L.Ed.2d 187, 192 (1983). Petitioner has not cited any errors of Constitutional dimension. The evidence was, contrary to petitioner's assertions, "otherwise admissible". Gregg, 96 S.Ct. at 2909, 49 L.Ed.at 859; Zant, 103 S.Ct. at 2750, 77 L.Ed.2d at 258.

III. PRESENCE OF ARBITRARY FACTORS

The Louisiana Supreme Court has reviewed petitioner's sentence twice; it has found each time that the sentence was not induced by arbitrary factors. The court specifically found, in its latest opinion, that the "overwhelming evidence" of petitioner's guilt and the heinous nature of the offense must surely have motivated the jury to sentence petitioner

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[2]The Michelson case, cited by petitioner, restricts the scope of evidence at the guilt phase of trial. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

to death. The jury was furnished with ample evidence offered in mitigation of petitioner's offense. Further, as the Louisiana Supreme Court noted, the jury was not instructed to weigh the evidence presented in any particular manner.

The State respectfully submits that the Louisiana Supreme Court's finding that petitioner's sentence is valid is not so "unprincipled" as to violate the Constitution. Barclay, 103 S.Ct. at 3423, 3427, 77 L.Ed.2d at 1142, 1148.

CONCLUSION

The limited function served by a jury's finding of a statutory aggravating circumstance does not render the Louisiana death penalty scheme unconstitutional as it is applied in the case.

In this case, the essential elements of a constitutional death penalty are present. The jury has made an individualized determination based on the defendant and the crime and the State Supreme Court has determined that the sentence was not arbitrary or disproportionate.

Therefore, this application is without merit and should be denied.

Respectfully Submitted,

WILLIAM GUSTE, JR
Attorney General
State of Louisiana

PHILIP BOUDOUSQUE
Assistant District Attorney
24th Judicial District Court
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
State of Louisiana

WILLIAM C. CREDO, III
Assistant District Attorney
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053
Telephone: (504) 368-1020

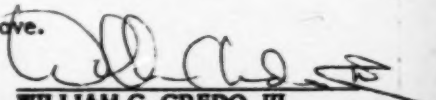
JOHN M. MAMOULIDES
District Attorney
24th Judicial District Court
State of Louisiana

CERTIFICATE

I, **William C. Credo, III,** a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of March, 1984, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On petitioner, Robert Sawyer, through his counsel of record, Catherine Hancock, **Esq. 7031 Freret Street, New Orleans, 70118.**

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.



WILLIAM C. CREDO, III